In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-786

ROBERT STEPHEN BASEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of possession of methamphetamine, a controlled substance, with intent to distribute (count 1 of a four count indictment), in violation of 21 U.S.C. 841(a)(1). He was sentenced to imprisonment for a term of three years. On September 29, 1972, the court of appeals affirmed the conviction (Pet. App. A). The petition for a writ of certiorari was not filed until November 28, 1972, and is therefore one month out of time under Rule 22(2) of the Rules

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of this Court.[1] In any event, there is no reason for further review.

The evidence at trial showed that shortly before June 4, 1971, a government informant working for the Boston, Massachusetts, office of the Bureau of Narcotics and Dangerous Drugs sent four 500 gram bottles of "P–2–P" (phenyl-2-propanone), an essential ingredient in the manufacture of methamphetamine, to one Karen Lyons in San Diego, California (Tr. 43, 47, 77). The P–2–P was supplied to Miss Lyons on the understanding that it would be used to make methamphetamine; three pounds of methamphetamine so made were to be sent as payment for the P–2–P to the Boston suppliers (Tr. 54).

On June 4, 1971, Agent Bullock, telephoning Miss Lyons from San Diego, stated that he was connected with her Boston supplier (Tr. 42–46). Miss Lyons indicated that she was having trouble contacting the person in San Francisco who had her "equipment" and that not much could be done until she found him (Tr. 46–47). During the following week Agent Bullock and Miss Lyons had daily telephone conversations about her progress in getting the necessary laboratory equipment (Tr. 48–49).

On June 15, 1971, after Miss Lyons had located the man with her equipment (Tr. 52), Agents Bullock and Hochman met with Miss Lyons and two of her accomplices, Roger Herrera and Jimmie Kibbee (Tr.

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[1] In moving for leave to submit the petition out of time, petitioner's counsel alleges that the delay resulted from a misunderstanding, between petitioner and his retained attorney below, as to the filing of the petition for certiorari.

54–55). Kibbee told the undercover agents that his partner, petitioner, wanted to meet them (Tr. 13, 91). Later that day, petitioner was introduced to the two agents, and arrangements were made regarding the exchange of P–2–P for amphetamine powder (Tr. 13–15). Petitioner asked the agents how much amphetamine they wanted and suggested that Kibbee obtain some laboratory equipment in Los Angeles (Tr. 16–17). Kibbee said that other customers were waiting for his amphetamines, which he claimed to be the best in San Francisco (Tr. 17). Agent Bullock then received from Kibbee, in petitioner's presence, a small plastic bag containing 0.9 of a gram of 100% pure D1-desoxyephedrine (G. Ex. 1), the amphetamine upon which Count I was based (Tr. 17–20, 72–76). Before the agents left their meeting, they discussed arrangements for subsequent exchanges (Tr. 20).

On June 17 and 18, 1971, an exchange took place in which petitioner gave government agents four packages containing 444.7 grams of 64% D1-desoxyephedrine and Agents Bullock and Hochman made their first delivery of P–2–P to petitioner (G. Exs. 2–5; Tr. 22–27, 72–74). Petitioner then promised that in a week he could show Bullock and Hochman photographs of a P–2–P laboratory (Tr. 92–93). During the next week petitioner and the government agents stipulated the terms for future transfers (Tr. 25–28). On June 25, 1971, when an exchange of materials was to take place, Agents Bullock and Hochman visited petitioner's laboratory in the kitchen of a motel room (Tr. 30–32). The agents then arrested petitioner along

with Herrera and Karen Lyons, seized all the laboratory equipment and chemicals (there was no P-2-P at the motel that day), and collected seven packages of amphetamine intended for immediate delivery and containing 778 grams of 42% D1-desoxyephedrine (G. Exs. 6–12; Tr. 32–33, 72–75, 78). After his arrest, in an offer to cooperate with federal authorities, petitioner told government agents of an "extensive" P-2-P laboratory that was "quite productive" (Tr. 94–95). He then took them to the laboratory and "surrendered" it (Tr. 95).

Petitioner's case was submitted to the jury on the issue of entrapment. During their deliberations the jury asked when P-2-P was "first supplied to [petitioner] by undercover agents" (Tr. 107). The court answered that the date was June 18 (Tr. 110). Observing that one juror was also wondering about "something that may have been sent from Boston," the court reminded the jury of the shipment, made shortly before June 4, from agents in Boston to Karen Lyons in San Diego. The jury was instructed to determine for themselves the relevance, if any, of such evidence (Tr. 112, 113).

The jury also asked whether Exhibit 1, the 0.9 grams of amphetamine delivered as a sample on June 15, was "manufactured from undercover agents' merchandise" (Tr. 109). The court discussed this problem with counsel for both sides outside of the presence of the jury. Both attorneys agreed with the court that the evidence was unclear as to the source of P-2-P for the sample, but that inferences could

be drawn from the available evidence (Tr. 109–110). The court then stated, in the presence of the jury, that (Tr. 113):

> As to the second question, there's just no evidence establishing that one way or the other. What Exhibit 1 was manufactured from—there was nothing in the testimony that directly connected Exhibit 1 * * *
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> By whom, how it was manufactured; not a word establishes that. You might be able to draw certain conclusions, but no reliable evidence at all on that.

Thereafter the jury convicted petitioner on Count I, based on the transfer of the "sample" on June 15, but acquitted petitioner on the other counts in which the record was undisputed that the amphetamines were manufactured from P–2–P supplied by the undercover agents.

ARGUMENT

Relying principally on *United States* v. *Russell,* 459 F. 2d 671 (C.A. 9), certiorari granted, October 16, 1972 (No. 71–1585), petitioner alleges that the conduct of the undercover agents "constitutes entrapment as a matter of law" (Pet. 7–8). In *United States* v. *Russell, supra,* a special agent of the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, approached the defendant and several accomplices who were suspected of engaging in the production of methamphetamine tablets. The undercover agent proposed an arrangement whereby the defendant and his accomplices would produce the

methamphetamines and the undercover agent would supply P–2–P without which the methamphetamines could not be produced. The defendant and his accomplices agreed, the methamphetamines were produced, and defendant was charged with manufacture, possession and sale of the drug. On these facts the court of appeals sustained the defense of entrapment "founded upon an intolerable degree of governmental participation in the criminal enterprise" (459 F. 2d at 673). The decision apparently rested principally on the court's conclusion that the P–2–P supplied by the undercover agent was difficult to obtain through other channels, and thus the court determined that "there could not have been the manufacture, delivery, or sale of the illicit drug [at issue in *Russell*] had it not been for the Government's supply of one of the essential ingredients. * * * Russell would have been powerless to 'commit' the charged offenses without the Government's pervasive intervention." (459 F. 2d at 672–673).[5]

Unlike *Russell*, the evidence here does not show that the undercover agents supplied the P–2–P which was used in the manufacture of the 0.9 gram sample of the finished product transferred on June 15. The record is uncontroverted that Agents Bullock and Hochman had supplied no P–2–P to petitioner or his associates

[5] The other cases upon which petitioner relies (Pet. 13) mainly involve instances in which it was held that a defendant could not be prosecuted for possession of contraband which originated with and was supplied by undercover agents and informants.

at the time the 0.9 gram sample was delivered on June 15. Although Karen Lyons had received P–2–P from government informants in Boston before June 4, the record discloses two grounds from which it could reasonably be inferred that the P–2–P used to make petitioner's sample came from a source other than the government shipment from Boston. First, there was a sustantial difference in purity between the sample delivered on June 15 (100% D1-desoxyephedrine) and the amphetamine turned over on June 18 (64% D1-desoxyephedrine). Since Agents Bullock and Hochman supplied no P–2–P until the exchange on June 18, the only government source of P–2–P available for the manufacture of amphetamine used in these two deliveries was the Boston shipment before June 4. Yet if the P–2–P had come from the same source in both instances, comparable degrees of purity in the finished product would be expected. Accordingly, the difference in purity between the two substances in question indicates that they were not necessarily manufactured from the P–2–P supplied by the undercover agents. Second, petitioner referred to a P–2–P laboratory, described as "extensive" and "quite productive", both at the time of the transaction on June 18 and after his arrest. The existence of this laboratory and petitioner's knowledge of it suggest that petitioner and his associates had independent sources of P–2–P available to them. Aside from this evidence clearly indicating an independent source for the P–2–P, we note as the court of appeals did that (Pet. App. 3):

> Neither the cited pages nor a careful examination of the entire transcript disclose any significant evidence that the .9 gram referred to in Count One was manufactured with the aid of P 2 P supplied by the government. When the sample was supplied to the agents, Mr. Kibbee, who produced it, had been and then was manufacturing amphetamines (as related by Agent Bullock) (Ct. tr., p. 17), and there were other sources of supply from which P 2 P could be obtained, according to Mr. Kibbee.

In this case the jury thoroughly considered the issue of the possible sources of P–2–P. Their careful attention to this matter is underscored by the questions they asked during deliberation as well as the fact that they acquitted petitioner on all counts based on transfers after June 15, presumably because of their conclusion that government agents had supplied the P–2–P in the post June 15 amphetamines.[3] The issue raised here as to Count I necessarily turns on the particular

[3] In light of the instructions given by the trial judge this is the only conclusion that can be drawn. The trial judge instructed the jury that "[b]y raising the defense of entrapment the defendant has admitted the commission of all the crimes with which he is charged in the indictment." After going on to give the traditional entrapment instruction, the trial judge further instructed the jury: "Where the methods employed on behalf of the Government fall below standards to which common feelings respond for the proper use of government powers then the predisposition of defendant need not be considered in the defense of entrapment." In these circumstances, the only basis for the acquittal on all counts, except for Count I, was the jury's findings that the undercover agents did not supply the P-2-P for the methamphetamines which were the subject of that count. We are lodging with the Clerk of the Court a copy of the instructions which are part of the file in the district court.

facts and circumstances presented by this case and raises no issue warranting further review.[4]

While it is true that the legal issues petitioner wishes to assert are now before the Court in *Russell* v. *United States*,[5] *supra*, there is no need to hold this case pending the decision in *Russell*, *supra*, since evidence does not establish that the undercover agents supplied the P–2–P in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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[4] Petitioner argues that in view of the trial judge's comment that there was "no evidence at all" bearing on the issue, the government failed to sustain its burden of proof to defeat the entrapment claim (Pet. 15). As the record reveals, however, the trial judge's statement to the jury, when viewed in terms of his prior dicussion with counsel, referred to the lack of *direct* evidence as to the supplier of P–2–P for the sample and pointed out that an inference could be drawn based on the evidence at hand (Tr. 113). Petitioner's claim that "it is inconceivable that this conviction should be allowed to stand without a shred of evidence * * * one way or the other" on the issue whether the P–2–P was supplied by the undercover agents (Pet. 15) wholly ignores the substantial circumstantial evidence indicating an independent source for the P–2–P at issue. The only person who could have supplied direct contrary evidence was petitioner. The fact that there is not "a shred of evidence" supporting his position is due to petitioner's strategic decision not to testify.

[5] Similar issues in contexts different from *Russell* are raised in *United States* v. *McGrath*, No. 72–761, petition for writ of certiorari filed November 22, 1972, and *United States* v. *Knight*, No. 72–965, petition for writ of certiorari filed January 8, 1973.